1992

GRO Enterprises, Inc., dba Chicago Barter Corporation v. National Insurance Marketing Services, Inc., a Utah corporation : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 92-0114-CA IN THE UTAH COURT OF APPEALS

GRO ENTERPRISES, INC., dba CHICAGO BARTER CORPORATION, Plaintiff and Appellee, vs. NATIONAL INSURANCE MARKETING SERVICES, INC., a Utah corporation, Defendant and Appellant.	Case Nos. 920114-CA and 920227-CA

BRIEF OF APPELLEE

APPEAL
FROM THE THIRD DISTRICT COURT
IN AND FOR THE COUNTY OF SALT LAKE
HONORABLE J. DENNIS FREDERICK, JUDGE

ARGUMENT PRIORITY CLASSIFICATION 16

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JURISDICTIONAL STATEMENT

This is a consolidated appeal from two orders of the Third Judicial District Court of Salt Lake County, State of Utah. In the first Order on appeal, the trial court sanctioned appellant's failure to cooperate in discovery by striking its answer and entering its default. In the second Order, the trial court denied appellant's Rule 60(b) motion to set aside the default judgment that had been entered as a result of the first Order.

Appellant appealed the first Order to the Utah Supreme Court, then filed its motion under Rule 60(b) with the trial court. Upon denial of the Rule 60(b) motion, appellant once again appealed to the Utah Supreme Court. Upon pour-over to this court, the two appeals were consolidated.

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Ann. § 78-2A-3(2)(j), Rules 3(a), 4(a), and 42 of the Utah Rules of Appellate Procedure, and the Utah Supreme Court's Orders dated February 20, 1992 and April 3, 1992 pouring over the consolidated cases for disposition by the Court of Appeals.

ISSUES ON APPEAL AND STANDARD OF REVIEW

1. Did the trial court abuse its discretion by imposing sanctions pursuant to Utah R. Civ. P. Rule 37(b)(2)(C) against appellant for its failure to answer discovery requests that had been served almost six months previously?

2. Did the trial court abuse its discretion in refusing to set aside the default judgment that it had previously entered as a discovery sanction?

The standard of review both issues is abuse of discretion. Amica Mutual Ins. Co. v. Shettler, 768 P. 2d 950 (Utah App. 1989).

RULES TO BE INTERPRETED

Utah R. Civ. P. Rule 37(b)(2): A complete copy of Utah R. Civ. P. Rule 37 is included in Appendix I hereto. In its relevant parts, Rule 37(b)(2) provides:

> (b)(2) Sanctions by court in which action is pending. If a party . . . fails to obey an order to provide or permit discovery, . . . the court may make such orders in regard to the failure as are just, and among others the following:
>
> * * *
>
> (C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Utah R. Civ. P. Rule 60(b): A complete copy of Utah R. Civ. P. Rule 60 is included in Appendix I hereto. In its relevant parts, Rule 60(b) provides:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . .

STATEMENT OF THE CASE

1. Appellant, National Insurance Marketing Services, Inc., will hereafter be referred to as "NIMS". Appellee, GRO

Enterprises, Inc., will hereafter be referred to as "GRO Enterprises".

2. GRO Enterprises brought the complaint below to collect a debt on account. NIMS denied the obligation, asserting a credit for items purchased but allegedly returned to GRO Enterprises.

3. On January 3, 1991, GRO Enterprises served NIMS with Interrogatories and a Request for Production of Documents. (R. 00012).

4. When the discovery was not answered within the 30 days provided by Utah R. Civ. P. Rule 33(a), GRO Enterprises's counsel sent a letter on February 14, 1991 to NIMS's counsel, reminding him of the obligation to answer the outstanding discovery. (R. 00015).

5. In response to the February 14th letter, NIM's counsel telephoned GRO Enterprises's counsel and advised that the discovery answers would be filed within the week. (R. 00013).

6. The discovery was not answered as promised. Two weeks later, on March 6, 1991, GRO Enterprises's counsel again wrote to NIM's counsel and asked that the discovery be answered. (R. 00016).

7. On March 7th, GRO Enterprises's counsel received a letter dated March 5 from NIM's counsel. (R. 00014 and 00017.) The letter stated:

> Thank you for your courteous extensions of time granted to answer your discovery in the above-entitled matter. The first extension was granted because of my absence from the country. The second was granted because

> Robert Weeks, president of National Insurance, was in Chile, South America. He will be returning on Friday, March 8, 1991, and we will promptly file our answers to your requested discovery.

(R. 00017).

8. No answers were filed. On April 3, 1991, more than three weeks after the March 7th letter, GRO Enterprises filed a Motion to Compel the answers to the discovery. (R. 00013-00020).

9. NIMS did not respond to the Motion to Compel. On April 19, 1991, GRO Enterprises served a Request to Submit for Decision to NIMS. (R. 00022). The request was filed with the court on April 22nd. (R. 00021).

10. On April 23rd, the court granted the Motion to Compel by minute entry, and mailed a copy to the parties' counsel on April 24th. (R. 00023).[1] The court entered its written Order granting the Motion to Compel on May 1st. (R. 00024-00025).

11. NIMS's counsel then filed a withdrawal of counsel with the court. (R. 00028-00029). Although the withdrawal was dated April 22nd, neither the court nor GRO Enterprises received the document until May 1st, nine days after it had purportedly been mailed. (R. 00028 and 00035).

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[1] The original motion had been brought by GRO Enterprises as plaintiff, but the Request to Submit the Motion for Decision inadvertently requested the court to rule on "Defendant's Motion to Compel". (R. 00021). Although the minute entry did grant the motion, it reflected the error in the submission request and ordered the wrong party, i.e., "plaintiff," to respond to the discovery. (R. 00023). At GRO Enterprises's request (R. 00026-00027), the court corrected the error and entered its order compelling NIMS to answer the discovery (R. 00024-00025).

12. On the day the withdrawal of counsel was received, i.e., May 1st, GRO Enterprises sent NIMS a Notice to Appear or Appoint New Counsel. (R. 00030-00031).

13. Nine days later, on May 10th, GRO Enterprises's counsel received a telephone call from an attorney who indicated that he was an attorney who would be representing NIMS in the lawsuit. In the course of that call, NIMS's successor counsel was advised of the court's May 1 order. (R. 00036). NIMS's successor counsel asked if the case could be settled by giving NIMS credit for certain items it claimed it had returned to GRO Enterprises. (R. 00082). GRO Enterprises's counsel indicated she did not know about any such credits, but agreed to look into the matter. R. 00082).

14. At his request, GRO Enterprises' counsel mailed NIMS's successor counsel a copy of the Complaint, Answer and the outstanding discovery requests to which the court had compelled NIMS to respond. (R. 00036).

15. Upon investigation of NIMS's claim to a credit, GRO Enterprises's counsel discovered that NIMS, through its former counsel, had already previously insisted upon a credit for goods allegedly returned to GRO Enterprises. Before the lawsuit had even been filed, GRO Enterprises had already rejected the same settlement offer that was made in the May 10th telephone conversation. (R. 00044-00045).

16. GRO Enterprises's counsel then wrote to NIMS's counsel on June 3rd, informing him that the settlement offer had

already once been rejected. In the letter, GRO Enterprises gave NIMS the same 10 day period to answer the discovery as the court had previously ordered, and advised that GRO Enterprises would approach the court on June 14th for an order entering NIMS's default if the discovery answers were not filed by then. (R. 00038).

17. On June 14th, which was a Friday, NIMS's successor counsel called GRO Enterprises's counsel's office and left a message that he could not get the discovery answers filed that day, but would have them delivered on the following Monday, June 17th. (R. 00036).

18. Although the affidavits below indicate that as of June 10th, NIMS's successor counsel was having difficulty getting in touch with his client, the affidavits do not claim that this was ever communicated to GRO Enterprises's counsel or to the court. Instead, NIMS's counsel indicated that the discovery responses would be filed by June 17th. (R. 00040-00041, 00045, 00081-00083).

19. No answers were filed or delivered on June 17th. (R. 00036), nor did NIMS's counsel contact counsel for GRO Enterprises to advise that he was having difficulty getting in touch with NIMS. (R. 00045)

20. On June 27th, when no discovery responses had been filed, GRO Enterprises filed a Motion for Entry of Default against NIMS. (R. 00033).

21. NIMS opposed the motion (R. 00040-42) and served answers to the Interrogatories on July 3rd. (R. 00043). No response was made to the Request for Production of Documents.

22. The court granted the Motion for Entry of Default by minute entry on July 31, 1991 (R. 00049), and entered its order and default judgment against NIMS on August 14, 1991 (R. 00050-00051, 00055-00056).[2]

23. On September 16, 1991, NIMS appealed the court's August 14, 1991 order and judgment. (R. 00057-00058).

24. On November 18, 1991, NIMS brought a motion pursuant to Rule 60(b)(1), Utah R. Civ. P. to set aside the default judgment (R. 00062-00063). NIMS argued that there was no willfulness in NIMS's failure to answer the discovery, and that the court should not have imposed the discovery sanctions. (R. 00068-00072). NIMS also argued that in the interests of justice, the judgment should be set aside because GRO Enterprises had wrongfully refused NIMS's credit and it would be unfair to not allow NIMS to present its defenses. (R. 00072-00075).

25. The court denied NIMS's motion to set aside the default, and entered its order on January 23, 1992. (R. 00105).

26. NIMS filed its notice of appeal of the January 23, 1992 order on February 24, 1992. (R. 0015).[3]

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[2] On March 16, 1992, the Order and Default Judgment were re-entered as of August 22, 1991, nunc pro tunc, to cure a defect in service of the proposed forms of the orders.

[3] February 22, 1992 was thirty days after the January 23 order was entered. However, February 22nd was a Saturday and the Notice of Appeal was filed on the following Monday. Utah R. App. P. Rule 22.

SUMMARY OF ARGUMENTS

POINT I. The trial court properly imposed sanctions against NIMS for its failure to cooperate in discovery. A judgment by default is a sanction available to a trial court upon a party's failure to fulfill its discovery obligations. In the case below, NIMS received during the course of the litigation, not one, but four extensions of time within which to answer outstanding discovery. NIMS made continual unfulfilled promises that it would answer the discovery promptly, delaying the litigation for months. NIMS never advised GRO Enterprises or the court that it was having any difficulty answering the discovery until after GRO Enterprises had moved the court for entry of judgment. Based upon NIMS's conduct, the trial court acted well within its discretion by sanctioning NIMS's conduct with entry of default judgment.

POINT II. NIMS's "Rule 60(b)" motion was in substance a motion to reconsider. The "excusable neglect" upon which NIMS's motion was predicated was not neglect in responding to the Motion to Enter Default, but alleged neglect in failing to answer discovery. In entering default judgment, the court had already ruled on that allegation of neglect. NIMS's "Rule 60(b)" motion was merely an effort to have the court reconsider its previous ruling. Such a motion is abortive under the rules and was properly denied.

POINT III. NIMS did not show sufficient grounds under Rule 60(b) to justify setting aside the default judgment. NIMS argues that the "interests of justice" mandate setting aside the

judgment, and that the judgment is a hardship to NIMS because it claims a credit. Therefore, NIMS argues, it should be allowed to present its defenses. NIMS's reliance on Rule 60(b) is misplaced, for the merits of the case cannot be considered on a Rule 60(b) motion. There was no "excusable neglect" sufficient to support a Rule 60(b) motion, given NIMS's conduct, and the trial court acted within its discretion in denying the motion.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY IMPOSED SANCTIONS AGAINST NIMS FOR ITS FAILURE TO COOPERATE IN DISCOVERY.

Rule 37(b) of the Utah Rules of Civil Procedure outlines the options available to a trial court in the event a litigant violates a court order and refuses to cooperate in discovery.

> The general rule is that a party in a civil case who refuses to respond to an order compelling discovery is subject to sanctions pursuant to Utah R. Civ. P. 37(b)(2))C). The sanctions are intended to deter misconduct in connection with discovery, and require a showing of "willfulness, bad faith, or fault" on the part of the non-complying party. The choice of an appropriate discovery sanction is primarily the responsibility of the trial judge and will not be reversed absent an abuse of discretion. (citations omitted).

First Federal Savings & Loan Assoc. v. Schamanek, 684 P. 2d 1257 (Utah 1984). In explaining the trial court's latitude with respect to Rule 37(b), the Utah Court of Appeals in Schoney v. Memorial Estates, 790 P. 2d 584 (Utah App. 1990), stated:

> Management of the actions pending before it is uniquely the business of the trial court and while an appellate court may, of course, intervene if discretion is abused, we accord trial courts consi-

> derable latitude in this regard and considerable deference to their determinations concerning discovery.

Id. at 585.

Among the possible sanctions available to the trial court upon a party's failure to fulfill its discovery obligations is the rendering of a judgment by default against the disobedient party. Rule 37(b)(2)(C). Thus a trial court's decision to enter a default judgment as a sanction against an uncooperative defendant is subject to review only for abuse of discretion.

A review of the record in the instant case reveals NIMS as an elusive and uncooperative defendant:

1. During the course of the litigation, NIMS received not one, but *four* extensions of time within which to answer the discovery. At first, NIMS failed to respond to the discovery by its due date on February 6, 1991. GRO Enterprises wrote to NIMS's counsel and asked that a response be filed. NIMS advised that it needed an extra week, which extension GRO Enterprises granted. On March 6th, GRO Enterprises once again requested NIMS to answer the discovery. NIMS thanked GRO Enterprises for the two extensions, and promised that the answers would be filed promptly. GRO Enterprises waited another three weeks before it finally filed its Motion to Compel on April 3, 1992. The time for filing a response to the Motion to Compel expired on April 16. NIMS made no response to the motion, so GRO Enterprises submitted it to the court for decision. The court ordered NIMS to answer, and gave it until May

11th to respond.[4] After the appearance of NIMS's new counsel, GRO Enterprises gave NIMS another extension, until June 14th. Even at that point, GRO Enterprises waited until June 27th before finally moving the court for sanctions. NIMS had ample opportunity to file a response, from February 6, 1991 when the answers were first due, until June 27th, when GRO Enterprises finally filed its motion for entry of default.

2. NIMS delayed GRO Enterprises for months with continual promises that it would answer the discovery promptly. In February, NIMS's counsel promised the overdue discovery answers within the week. He indicated he had been out of the country and had not been able to prepare the answers. Again in March, NIMS promised a prompt response to the unanswered discovery. The excuse

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[4] The withdrawal of NIMS's counsel at this time is a red herring that has no bearing on NIMS's responsibility to cooperate in the discovery process or on the court's subsequent sanction of NIMS's conduct. Notably, entry of the May 1 order is not on appeal. The Motion to Compel was granted on May 1st because 1) the trial judge had obviously not yet seen or apparently even received the withdrawal, 2) good cause appeared for granting the motion based on NIMS's failure to meet two extension deadlines, and 3) no opposition had been filed by the April 16th deadline for any such opposition. The purported April 22d withdrawal, filed with the court on May 1st, came after expiration of the deadline for opposition to the Motion to Compel and after GRO Enterprises had served its Request to Submit the Motion for Decision.

Furthermore, the entry of the Order on May 1st did not prejudice NIMS in any way. NIMS had shirked its discovery responsibilities before the court ever entered the May 1st order. After the order was entered, and knowing that it had not met previous deadlines, NIMS further delayed by proffering an already rejected settlement through counsel who were unaware of previous negotiations. NIMS's principal, well aware that the settlement had already been rejected, then left the country without making adequate arrangements for the discovery to be answered. After its May 1st Order, the court gave NIMS 10 days to answer the discovery. NIMS obtained new counsel on May 10th, and the Motion for Entry of Default was not filed until weeks later, on June 27th.

then was that NIMS's principal officer had been out of the country and could not assist in preparation of the answers. The answers were promised to be filed promptly. Then after the Motion to Compel had been granted and after NIMS obtained new counsel, NIMS once again promised answers; this time they would be delivered on June 17th. Despite all NIMS's promises, no answers at all were filed until after GRO Enterprises filed its Motion for Entry of Default. And even then, NIMS did not file a response to the Request for Production of Documents. NIMS's continued course of conduct in promising responses to the discovery delayed the case for months.

3. NIMS did not advise GRO Enterprises or the court that it was having difficulty meeting the final June 14th extension, until after GRO Enterprises had moved the court for entry of default. NIMS's counsel's affidavits claim that as of June 10th, NIMS's principal officer was out of the country and unable to assist him in answering the discovery requests. GRO Enterprises was not advised of that fact, but instead, on June 14th was told the answers would be filed on June 17th. GRO Enterprises did not file its Motion for Entry of Default until ten days after that, on June 27th. Yet even with that one final extension of time, and despite GRO Enterprises's forewarning that it would ask the court for entry of default, NIMS made no further effort to communicate with GRO Enterprises, and made no motion to the court for an extension of time. The alleged difficulty in obtaining discovery

responses was not raised until after the Motion to Enter Default had been filed.

A review of the record shows that the court had ample grounds to disbelieve NIMS's claim that its failure to cooperate was without fault. The trial court acted well within its discretion by sanctioning NIMS's conduct and entering its default.

POINT II.

NIMS'S "RULE 60(B)" MOTION WAS SIMPLY A MOTION TO RECONSIDER, WHICH IS ABORTIVE UNDER THE RULES AND PROPERLY DENIED.

NIMS brought a motion under Rule 60(b), Utah R. Civ. P., to set aside the default judgment that had been entered against it. The motion was really an effort to have the trial court reconsider its decision granting GRO Enterprises's Motion to Enter Default. In support of its Rule 60(b) Motion, NIMS did not offer any evidence indicating that it had difficulty in responding to GRO Enterprises's original motion or that it did not have the opportunity to fully address the motion. Nor did NIMS offer any new evidence that was unavailable at or before the time the court granted judgment. Rather, in support of its Rule 60(b) motion, NIMS filed an additional affidavit reiterating the reasons why NIMS did not respond to the discovery. NIMS cited legal authorities for the proposition that the court had abused its discretion in sanctioning NIMS for its failure to respond to the discovery. In other words, NIMS wanted the court to reconsider the sanction that it had imposed as a result of NIMS' failure to cooperate in discovery.

The Utah Supreme Court has repeatedly held that a "motion to reconsider" does not exist, and is, in fact, abortive under the Utah Rules of Civil Procedure. Utah State Employees Credit Union v. Riding, 24 Utah 2d 211, 469 P. 2d 1 (1970). In articulating the reasoning behind that position, the Utah Supreme Court, in Peay v. Peay, 607 P. 2d 841, 843 (Utah 1980), stated:

> "[I]f the party ruled against were permitted to go beyond the rules, make the motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for re-re-consideration, asking the court to again reverse himself?
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> * * *
>
> ". . . in order to avoid such a state of indecision for both the judge and the parties, practical expediency demands that there be some finality to the actions of the court; and he should not be in the position of having the further duty of acting as a court of review upon his own ruling."

Peay v. Peay, 607 P. 2d, 843, quoting Drury v. Lunceford, 18 Utah 2d 74, 415 P. 2d 662 (1966).

At the time NIMS's Rule 60(b) motion was brought, NIMS had already appealed the discovery sanctions. The docketing statement set forth the issue on appeal as:

> Did the trial court abuse its discretion by sanctioning the failure to respond to discovery with a default judgment entered in the principal sum of $12,559.70 (giving no allowance for the $11,050.00 credit claimed) on the basis of an Order entered when defendant was unrepresented by counsel, where after the appearance of new counsel and the breakdown of settlement negotiations, appropriate response was made to the discovery within a

month despite the defendant's principal offers of being in Chile? [emphasis added]

NIMS filed its Notice of Appeal precisely because it did not agree with the trial court's determination that the sanctions were appropriate. The "excusable neglect" on which the Rule 60(b) motion was predicated was not neglect in responding to the Motion to Enter Default, but alleged neglect in failing to answer discovery. The Rule 60(b) motion was simply a motion to reconsider the original Motion to Enter Default, and it was properly denied.

POINT III.

NIMS DID NOT SHOW SUFFICIENT GROUNDS UNDER RULE 60(b) TO JUSTIFY SETTING ASIDE THE DEFAULT JUDGMENT.

Even if NIMS had properly brought a Rule 60(b) motion to set aside the default judgment, the court acted well within its discretion in denying the motion. In its brief on appeal, NIMS argues only that the default judgment should have been set aside because of the "interests of justice." NIMS does claim that the discovery was not answered because of excusable neglect, but NIMS does not offer any evidence that the judgment itself was entered as a result of excusable neglect, or any other reason under Rule 60(b)(1) (mistake, inadvertence, surprise). Rather, NIMS argues that because NIMS claims a credit, entry of a default judgment is a hardship, and it is in the best interests of justice to allow presentation of all defenses. (Appellant's Brief, pp. 15-17). In essence, NIMS is arguing that it is unfair that a judgment was entered without NIMS being able to present its claimed defenses.

NIMS' reliance on Rule 60(b) is misplaced. NIMS has known from the commencement of the lawsuit that it claimed defenses to the lawsuit. It was presumably the subject of the accord and satisfaction defense presented in defendant's Answer to the Complaint. But NIMS's argument about the offset goes, not to an allegation of injustice, but to the merits of the case, which cannot even be considered on a Rule 60(b) motion. Larsen v. Collina, 684 P. 2d 52 (Utah 1984). If all defendants were to be allowed relief from default because they suffered hardship of being unable to present their defenses, no default judgment would ever stand.

Even if the excuses NIMS offered for failing to answer the discovery were the proper basis for a Rule 60(b) motion, NIMS still did not show sufficient grounds to justify setting aside the default judgment. For more than three months prior to NIMs' new counsel's entry of appearance, NIMS failed to answer the discovery. Absolutely no excuse has been offered for that lengthy delay. After NIMs' new counsel entered an appearance, still no effort was made to apprise Gro Enterprises or the court of any difficulties NIMS was having in answering the discovery. Indeed, as of June 27, 1991, and after three extensions and a court Order requiring the defendant to answer, NIMS had still not filed answers, and had given no indication to Gro Enterprises that it had undertaken any efforts at all to answer the discovery. While NIMS's successor counsel may not have been at fault in failing to respond to the outstanding discovery, NIMS itself had failed for months to

cooperate. NIMS cannot avoid the consequences of its actions by switching lawyers mid-stream and then arguing injustice because new counsel was perhaps unaware of all that had previously transpired.

In the analogous case, Katz v. Pierce, 732 P.2d 92 (Utah 1986), the Supreme Court of the State of Utah upheld the trial court's entry of a default judgment against defendants who failed to answer a complaint. The defendants attempted to excuse their default by claiming they were negotiating a settlement with plaintiff's counsel. Approximately a week before the Answer was due, plaintiff's counsel advised the opposing attorney that if an Answer was not filed within the time limits, he would have the defendant's default entered and obtain a default judgment. The Court specifically commented on the defendants' failure to request additional time and their failure to notify plaintiff of any claimed hardship as a result of some of the defendants' out of sate residence. Finding that the defendants had a responsibility to affirmatively seek an extension of time, the Court upheld the trial court's refusal to set aside the default.

In holding in Katz v. Pierce, the Utah Supreme Court acknowledged that an abuse of discretion must be shown in order for an appellate court to overrule a trial court in this circumstance, Id. at p. 93, and noted that an abuse of discretion will not be shown if substantial support for the trial court's decision exists in the record. Id. at p. 95.

In the case at issue, the record below substantially supports the trial court's decision to refuse to set aside the default

judgment. NIMS failed to show that the default judgment was entered as a result of excusable neglect. The trial court did not abuse its discretion in refusing to set aside the default judgment.

CONCLUSION

In controlling and managing its own calendar, the trial court is given broad discretion to sanction a litigant's failure to cooperate in discovery. In the case below, the trial court's discretion was properly exercised, both in first sanctioning NIMS's conduct with entry of a default and them refusing to reconsider its decision. The Default Judgment and the Order denying NIMS's motion to set aside the Default Judgment should be affirmed.

DATED this 11th day of June, 1992.

Leslie Van Frank
COHNE, RAPPAPORT & SEGAL
Attorney for Plaintiff/Appellee

MAILING CERTIFICATE

The undersigned hereby certifies that 4 true and correct ~~copy~~ Copies of the foregoing was mailed, postage fully prepaid, on the 11th day of June, 1992, to the following:

Lynn P. Heward
Delwin T. Pond
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Salt Lake City, Utah 84117

APPENDIX I

Utah 341, 150 P. 935 (1915); State v. De Pretto, 48 Utah 249, 155 P. 336 (1916).

—Unavailability of witness.

By applying the Utah Rules of Evidence to the issue of unavailability of a witness and thereby denying admission of a deposition, the trial judge did not abuse his discretion. State ex rel. State Dep't of Social Servs. v. Ruscetta, 742 P.2d 114 (Utah Ct. App. 1987).

—Use by either party.

Either party could introduce all or any competent and relevant parts of deposition which were not fragmentary or misleading; opposing party could put in evidence any other relevant part. Where one party offered part and opposing party offered other parts which merely modified or explained that offered by first party, what was offered by both parties made deponent witness of first party; but if parts offered by opposing party in no particular modified or explained what was offered by first party, as to parts offered by each, deponent was witness for each. Brooks v. Scoville, 81 Utah 163, 17 P.2d 218 (1932).

Publication.

Subdivision (d) now makes "publication" of a deposition unnecessary. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery § 193 et seq.

C.J.S. — 26A C.J.S. Depositions §§ 19, 56, 88 et seq., 96, 100, 105.

A.L.R. — Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

Libel and slander: application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures, 23 A.L.R.3d 1172.

Physician-patient privilege, pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of, 25 A.L.R.3d 1401.

Privilege, assertion of, in pretrial discovery proceedings as precluding waiver of privilege at trial, 36 A.L.R.3d 1367.

Key Numbers. — Depositions ⇐ 53, 86 et seq., 88, 104, 107, 111.

Rule 33. Interrogatories to parties.

(a) **Availability; procedures for use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Scope; use at trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) **Option to produce business records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule corresponds to Rule 33, F.R.C.P.

Cross-References. — Admissibility of evidence, Rules 401 to 411, U.R.E.

Business entries and the like, admissibility of, Rule 803(6), U.R.E.

Computation of time, Rule 6(a).

Discovery procedures, Rule 4-502, Rules of Judicial Administration.

Pretrial procedure; formulating issues, Rule 16.

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Use at trial.
—Admissions against interest.
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Cited.

Privilege against self-incrimination.

Privilege against self-incrimination may be asserted in civil discovery proceedings, including interrogatories; however, to sustain an assertion of the privilege, a party must show that the responses sought to be compelled might be incriminating. First Fed. Sav. & Loan Ass'n v. Schamanek, 684 P.2d 1257 (Utah 1984).

Use at trial.

—Admissions against interest.

Where answers to interrogatories are to be used to establish a fact, they can only be used as admissions against the party making them; thus, they are objectionable when offered by the party making them because they are self-serving and not subject to cross-examination. Hill ex rel. Fogel v. Grand Cent., Inc., 25 Utah 2d 121, 477 P.2d 150 (1970).

—Impeachment.

——Unsigned interrogatories.

Interrogatories signed by general manager on behalf of corporate defendant could be used to impeach the only witness who testified on behalf of defendant even though the witness did not sign the interrogatories. Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232 (Utah 1984).

Cited in State ex rel. Rd. Comm'n v. Petty, 17 Utah 2d 382, 412 P.2d 914 (1966); W.W. & W.B. Gardner, Inc. v. Park W. Village, Inc., 568 P.2d 734 (Utah 1977); Erickson v. Wasatch Manor, 802 P.2d 1323 (Utah Ct. App. 1990).

Key Numbers. — New Trial ⇐ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion to set aside judgment, §§ 78-3-16.5, 78-4-24, 78-6-14; Appx. D, Code of Judicial Administration.

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"Any other reason justifying relief."
—Default judgment.
—Impossibility of compliance with order.
—Incompetent counsel.
—Lack of due process.
—Merits of case.
—Mistake or inadvertence.
—Real party in interest.
Appeals.
Clerical mistakes.
—Computation of damages.
—Correction after appeal.
—Date of judgment.
——Void judgment.
—Estate record.
—Inherent power of courts.
—Intent of court and parties.
—Judicial error distinguished.
—Order prepared by counsel.
—Predating of new trial motion.
Court's discretion.
Default judgment.
Effect of set-aside judgment.
—Admissions.